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EXAMINER

NGUYEN, PHUONG T

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte THEODORE HUBBARD, THOMAS TEALDI, and
KYLE IMATANI

Appeal 2015-001937
Application 13/425,541¹
Technology Center 3700

Before JOHN C. KERINS, STEFAN STAICOVICI, and LEE L. STEPINA,
Administrative Patent Judges.

STAICOVICI, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Theodore Hubbard et al. (Appellants) appeal under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 1–16.² We have jurisdiction over this appeal under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We REVERSE.

¹ According to Appellants, the real party in interest is Ashlock Company, a Division of Vistan Corporation. Br. 1 (filed Aug. 21, 2014).

² Claims 17–34 are canceled. Final Act. 2 (mailed June 23, 2014).

INVENTION

Appellants' invention relates to an "apparatus for scarifying fruit (e.g., frozen cranberries or blueberries) using at least one pair of opposed knives." Spec. 1, ll. 4–5.

Claim 1, the sole independent claim, is representative of the claimed invention and reads as follows:

1. An apparatus for scarifying fruit, including:
at least one pair of opposed knives; and
a knife-driving assembly coupled to the knives and
configured to advance the knives of the pair contemporaneously
into an article of fruit through at least two locations on the
surface of the fruit, such that neither of the knives advances so
far into the fruit that its tip protrudes out from the fruit, wherein
the knife-driving assembly is also configured to retract each of
the knives out from the fruit, after said each of the knives has
reached its deepest point of penetration in the fruit.

THE REJECTIONS

The following rejections are before us for review:

I. The Examiner rejected claims 1–10, 12, and 13 under 35 U.S.C. § 102(b) as being anticipated by Cimperman (US 4,871,568, iss. Oct. 3, 1989).

II. The Examiner rejected claims 11 and 14–16 under 35 U.S.C. § 103(a) as being unpatentable over Cimperman and Riesenberg (US 6,969,535 B2, iss. Nov. 29, 2005).

ANALYSIS

Rejection I

Claim 1 recites, in relevant part, “a knife driving assembly coupled to the knives and configured to advance the knives . . . such that neither of the knives advances so far into the fruit that its tip protrudes out from the fruit.” Br. 11.

The Examiner finds that

Cimperman discloses an apparatus (figs. 1-7) for scarifying fruit, including: at least one pair of opposed knives (22, 24, fig.5); and a knife-driving assembly (55, 52, 23, fig.5) coupled to the knives (22, 24) and configured to advance the knives (22, 24) of the pair . . . such that neither of the knives (22, 24) advances so far into the fruit that its tip protrudes out from the fruit.”

Final Act. 2.

In the Response to Amendment section of the Final Action, the Examiner takes the position that as Appellants have not clearly defined the term “fruit,” it is reasonable to broadly interpret the term “fruit” as a watermelon because watermelon is a fruit. *Id.* at 8. Based on this interpretation, the Examiner concludes that “the Cimperman reference reads on the phrase ‘... such that neither of the knives (22, 24) advances so far into the fruit [water-melon] that its tip protrudes out from the fruit [watermelon].’” *Id.* at 8–9.

Appellants assert that Cimperman ““undesirably advances a knife completely through an article of fruit (the advancing knife’s tip exits the fruit so as to eject the pit from within the fruit).”” Br. 6 (citing Spec. 4, ll. 3–18, describing Cimperman in the “Background of the Invention” section).

Appellants explain that “element 60 (of the second knife) . . . push[es] the separated portion of the fruit out from the cored fruit past the distal surface of the cored fruit.” *Id.* at 7. Thus, according to Appellants, the disclosure of Cimperman “is a teaching (independent of the size of the fruit) that the second knife should be advanced so far that its tip protrudes out from the cored fruit,” and that the Examiner has not pointed to “support determinable from Cimperman or any other reference of record that Cimperman’s apparatus should somehow be modified so that its knife-driving assembly does not cause element 60 (of the second knife . . .)” to operate as disclosed in Cimperman. *Id.* at 8.

The Examiner responds that “[t]he knife (22, 24, fig.5) of [the] Cimperman reference is capable to cut a very large fruit such as a water melon; therefore the Cimperman reference reads on the (claimed) limitations . . . as well.” Ans. 3 (mailed Sept. 10. 2014).

Although we appreciate Appellants’ position that Cimperman’s element 60 pushes core 13 out of olive 10, we note that the Examiner relies on knives 22, 24 as the claimed “pair of opposed knives,” and not on element 60, i.e., eject pin 60, as Appellants argue. *See* Final Act. 2. Nonetheless, we do not agree with the Examiner’s position that the tip of Cimperman’s knife 22 will not protrude out of the olive/watermelon fruit, because the Examiner does not adequately explain how the size of the olive/fruit would change the operation of Cimperman.

Cimperman discloses pushing olive 10 with an assembly of plunger shaft 21, knife 22, and eject pin 60 to the right into engagement with surface 16b of pocket 16 (of plate 17) while knife 24 is being retracted to the right

through orifice 16a of pocket 16. Cimperman, col. 4, ll. 49–53, Figs. 4, 5. Furthermore, in Cimperman’s Figure 4, which shows core 13 (including pit 11 and end portions 12a, 12b) still contained within olive 10, “spring 61 is fully extended, (so that) inner end portion 60b (of pin 60) engages with shoulder 22a of knife 22 . . . [and] pin 60 is retained within knife 22.” *Id.* at col. 4, ll. 30–32. At the same time, the outer end 60a of pin 60 is substantially vertically aligned with the tip of knife 22. *See id.* at Fig. 4. Accordingly, as end portion 60b of pin 60 is engaged by shoulder 22a of knife 22, and end portion 60a is aligned with the tip of knife 22, in order for Cimperman’s device to remove core 13 “the assembly including plunger shaft 21, knife 22, and eject pin 60 *continues* to advance to the right and knife 24 *continues* to retract to the right” until core 13 passes through pocket 16 and is ejected. *Id.* at col. 4, ll. 56–62 (emphasis added); Figs. 4 and 5. Thus, the tip of knife 22 must also pass through olive 10 in order to eject core 13 through orifice 16a. As such, even if the device in Cimperman was capable of fitting a watermelon, as the Examiner proposes, the device would operate such that the tip of knife 22 would still extend through the watermelon so as to expel a portion of the watermelon. Therefore, for the foregoing reasons, the Examiner has not established a prima facie case of anticipation.

Accordingly, we do not sustain the rejection of claims 1–10, 12, and 13 under 35 U.S.C. § 102(b) as anticipated by Cimperman.

Rejection II

The Examiner does not rely on Riesenbergr in any manner that would remedy the deficiencies of Cimperman as described *supra*. See Final Act. 6–8. Accordingly, for the same reasons, we also do not sustain the rejection under 35 U.S.C. § 103(a) of claims 11 and 14–16 as unpatentable over Cimperman and Riesenbergr.

SUMMARY

The Examiner’s decision to reject claims 1–10, 12, and 13 under 35 U.S.C. § 102(b) as anticipated by Cimperman is reversed.

The Examiner’s decision to reject claims 11 and 14–16 under 35 U.S.C. § 103(a) as unpatentable over Cimperman and Riesenbergr is reversed.

REVERSED